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## **A health regulator that needs an ICU**

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Are you an unfit or incompetent doctor in the state of California? You can rest easy, because the Medical Board of California is on your case.

The Medical Board is the state agency charged with protecting patients through "vigorous, objective enforcement" of physician licensing and disciplinary laws. Its role is to investigate complaints and to force underperforming doctors out of business.

It's a failed regulator. California's board consistently ranks near the bottom of all such bodies in the country when measured by the number of serious disciplinary actions it imposes -- license revocations, surrenders, suspensions and probations -- as a percentage of all doctors licensed in the state.

In 2009, the last year for which these statistics were compiled by the Washington consumer group Public Citizen, California ranked 41st, down from 22nd in 2004 -- one of the worst plunges in rank of any state in the union.

Criticism of the agency's performance doesn't come only from outside. An internal review commissioned by the board found last year that the number of disciplinary complaints the agency referred for investigation or to the state attorney general's office, which handles their ultimate disposition, had declined from 1,443 in 2004-05 to 1,123 in 2008-09.

Nor does justice act swiftly in these cases. The board's figures show that on average it takes more than 400 days to complete an investigation of a complaint about a doctor, and another year to bring a disciplinary case to a conclusion. All the while, a potentially dangerous doctor may still be practicing.

What's scary about this trend is that it comes as the board struggles with enormous new responsibilities, the result of a 2007 state court ruling that stripped licensing authority over physician-owned outpatient clinics from the Department of Public Health and handed it to the board.

The ruling dumped the task of regulating more than 700 clinics onto an agency that had not regulated medical facilities before and lacks staff with the experience and training to do the job. The medical board hasn't urgently sought more money, more legal authority or more staff to handle its important new duties. Instead it outsources oversight of these settings to four independent nonprofit accreditation organizations.

But those bodies don't have the legal authority to shut down a dangerous site or fine its owners for safety violations. Nor are the accreditation bodies required to coordinate with one another to make sure that a clinic whose accreditation is revoked by one for safety deficiencies doesn't simply sign up with another.

Consequently, these surgical settings operate without adequate regulatory scrutiny despite playing an ever-increasing role in your healthcare. They offer cosmetic and weight-loss surgery, colonoscopies and other procedures, often under anesthesia. Are they safe? No one knows, because neither the board nor the Legislature requires them to report adverse events, such as emergency transfers of patients to hospitals or botched surgeries.

Notwithstanding the board's central role in licensing and disciplining physicians, it's almost unknown to the public. So here's a primer.

Its 15 members serve without pay, except for expenses and per diems for board business. The governor appoints 13 members and the Assembly speaker and Senate rules committee one each. Of the current members, 10 are doctors or other healthcare professionals, and three are public members with political connections. Two gubernatorial seats are vacant.

Here's something else the public may not know: The agency is pitifully understaffed, and has been for years. According to a report made at the board's quarterly meeting in January, for example, the agency then was staggering under 34 vacancies, 12% of its staff.

The existing staff does a heroic job under tough conditions, but the board doesn't have enough medical experts on call for timely review of patient complaints. It has difficulty retaining investigators because they're paid less than those working for the attorney general -- so after the board trains them and gives them a bit of experience, they often quit for greener pastures. During the Schwarzenegger administration, the board appealed to the governor for exemptions from his hiring freezes and other cutbacks. It was turned down.

What's worse, in 2008, Schwarzenegger raided the board's bank account, money that's supposed to be used to enforce health and safety laws, by "borrowing" \$6 million from the agency to balance the state budget. It hasn't been paid back, according to the California Medical Assn., which sued the governor in state court to overturn the loan (and lost). Gov. Jerry Brown, knowing a good thing when he sees it, is proposing to "borrow" an additional \$9 million.

The money so cavalierly diverted by these governors doesn't come from the taxpayers. The board's budget -- \$56 million is proposed by Brown for the coming year -- comes from license fees paid by doctors and surgeons.

Before 2006, when the Legislature increased the biannual medical license fee to a base of \$790, the fee hadn't been raised in 12 years. That meant that inflation had shriveled the board's income 28% over that period, according to Julie Fellmeth, a San Diego public interest lawyer who spent two years monitoring the board's enforcement program as an appointee of the Legislature.

There hasn't been a significant increase since then. The main reason is undoubtedly the opposition of the politically powerful CMA, which evidently prefers that its members keep a few hundred bucks more a year in their pockets over having the state's guardian of safe medicine have enough money to do its work.

I asked James T. Hay, the CMA's president-elect, if he didn't agree that the board needed more money so it could improve its record on enforcement. He didn't.

"We think they have enough resources," he told me. "Certainly they built up a substantial surplus, otherwise the governors couldn't have raided it."

That leaves it up to the board members to demand adequate resources.

Its current president, Barbara Yaroslavsky, said she's suggested privately to Assembly Speaker John Perez and Senate President Pro Tem Darrell Steinberg that the board's budget be taken firmly out of the governor's grasp.

But she turned indignant when I suggested that she and her colleagues go public about the decimation of the board's enforcement capabilities -- give a few speeches, shout from the rooftops, anything.

"We are part of the administration, part of the community of the state of California," she said. "We do not act independently and we never should."

But why not? What would it cost the board members to take a public stand against the frittering away of their regulatory resources? They're unpaid, after all. By the way, there can't be many members of appointed state regulatory bodies with as much political juice as Barbara Yaroslavsky. The longest-serving member of the board, she's a prominent Los Angeles community activist whose husband, Zev, is a Los Angeles County supervisor widely considered a front-runner to become Los Angeles mayor next year.

One speech by Yaroslavsky, one threat to resign over fiscal raids on the board, and she'd get a lot more public attention than with a thousand unpublicized meetings with the legislative leadership.

Dr. Sidney Wolfe, Public Citizen's health research director, says that high-functioning state medical boards distinguish themselves from poor or mediocre ones by being more independent from their state medical associations, more proactive in hunting down dangerous situations needing correction or reform, and more balanced in their membership between doctors and patient advocates.

In an upcoming column I'll examine how the state's system of medical regulation got so tattered, and what to do about it. It's already clear that a good place to start would be reconstituting the medical board to replace its majority of doctors and politicians with a few truly independent advocates for patient health.

Who would be hurt by such a change? Not good doctors, whose reputations are marred by the work of unfit colleagues. And not the patients.

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